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No. 10-848

Supreme Court, U.S.
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In The
Supreme Court of the United States

EDMUND G. BROWN Jr., et al.,

Petitioners,

v.

JERRY VALDIVIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

The Court should grant certiorari because the Ninth Circuit Court of Appeals' decision undermines the Court's precedent in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), prescribing that the confrontation rights of parolees in revocation hearings should not exceed the confrontation rights of defendants in criminal prosecutions. Not limiting its holding to the facts and circumstances of this case, the Ninth Circuit declared that (1) states cannot rely on hearsay exceptions for the admission of evidence in parole revocation proceedings, despite such exceptions being available in criminal prosecutions; and (2) balancing under *United States* v. *Comito*, 177 F.3d 1166 (9th Cir. 1999), must be performed even for hearsay that is merely offered as foundational to corroborate the reliability of the proffered evidence, despite no parallel requirement in criminal trials.

Certiorari should also be granted because the Ninth Circuit admittedly created a direct conflict with the Second Circuit. That circuit holds that in a parole-revocation proceeding, where the government proffers hearsay that would be admissible in a criminal proceeding under an "established exception to the hearsay rule," no good-cause analysis is required.

And finally, because the Ninth Circuit's opinion provides confrontation rights to parolees under the Fourteenth Amendment beyond those afforded criminal defendants under the Sixth Amendment, it cannot

evade consideration that the opinion prompts an undesirable derivative – criminal defendants seeking additional confrontation rights under the Fourteenth Amendment.

I. The Ninth Circuit's Decision Violates the Court's Mandate in *Morrissey* by Elevating the Confrontation Rights of Parolees Above those of Criminal Defendants.

Because the Court directs that revocation hearings are not to be equated to criminal prosecutions, Petitioners seek to enforce this edict in the face of the Ninth Circuit's decision that ignores it. In addressing whether the panel majority opinion runs afoul of *Morrissey*, Respondents contend that Petitioners would "selectively incorporate Sixth Amendment standards into parole revocation due process." (Brief in Opp. at 22.) Respondents are incorrect.

As plainly put, confrontation rights afforded under the Fourteenth Amendment to parolees who possess a lesser liberty interest must not exceed the confrontation rights afforded under the Sixth Amendment to criminal defendants who have a greater liberty interest. *Morrissey*, 408 U.S. at 489. Thus, confrontation rights in the context of hearsay exceptions, established by the Court under the Sixth Amendment, are the standards against which confrontation rights under the Fourteenth Amendment must be measured. Where, as here, an aberration has

resulted in the benchmark being nullified, corrective action by the Court is vital to the restoration of constitutional balance.

II. The Ninth Circuit Admittedly Created a Circuit Split.

Petitioners contend that there is no circuit split that warrants review, when in fact, the panel majority explicitly acknowledges the conflict, and ostensibly invites review.

> We are aware of the Second Circuit's contrary holding. *See United States* v. *Williams*, 443 F.3d 35, 35 (2d Cir. 2006). However, as a three-judge panel, and with no intervening Supreme Court or Ninth Circuit precedent, we are bound by this court's holding in *Comito*.

App. 11a, n.4.

Indeed, seven more judges of the Ninth Circuit confirm the direct circuit split created by the panel majority opinion. App. 30a (Noonan, J., dissenting); App. 89a-90a (Bea, J., dissenting). And the Tenth Circuit also points out the direct circuit conflict. *Curtis* v. *Chester*, 626 F.3d 540, 546 (10th Cir. 2010). "[T]he Second Circuit recognizes that no balancing test is required for proffered out-of-court statements that are admissible under an established exception to the hearsay rule," and "only the Ninth Circuit" has expressly held otherwise. *Id.* Certiorari should be granted to resolve this circuit split.

III. This Case Presents a Proper Vehicle for Resolving the Important Question Presented in the Petition.

1. The Ninth Circuit's opinion presents a constitutional issue, not merely one of interpretation of the injunction. Respondents contend, however, that the panel majority decision is merely about remedies necessary for California's parole system as agreed to in the injunction, and is not a proper vehicle for review. While the provision in the injunction may have been the vehicle by which the dispute came about, the Ninth Circuit did not limit the scope of its decision only to California because of the injunction.

Instead, the panel majority alerted all states within the Ninth Circuit that "[t]he law of this circuit is clear: the *Comito* test remains central to confrontation rights in parole revocation hearings." App. 8a. The panel majority further stated that neither the Special Master nor the district court erred "in the determination that *Comito* balancing continues to be the test in the Ninth Circuit." App. 10a.

The manner in which the panel majority rendered its holding does not suggest that it was deciding the case within the confines of the injunction. Rather, the reasonable inference is that the panel majority believed it was constitutionally compelled to decide the issue the way it did.

2. The issues presented in the petition are ripe for review and are not subject to further litigation in the remand proceedings. Respondents incorrectly

assert that the issues in the Petition are not ripe for review because, in Part II of the panel majority's opinion, "the Ninth Circuit has directed the district court to consider modification of the entire remedy based on a new state law regarding parole revocation." The district court's order that was overturned and remanded for further proceedings in Part II of the Ninth Circuit's opinion did not involve the *Comito* issue. *Valdivia* v. *Schwarzenegger*, 603 F. Supp. 2d 1275, 1282-84 (E.D. Cal. 2009). Indeed, in finding that the hearsay/confrontation portion of the statute enacted under California Proposition 9 did not conflict with the injunction, the district court confirmed that whether hearsay evidence is admitted "is guided by the terms of the Injunction, which incorporates controlling law as set forth in *United States* v. *Comito*." *Id.* at 1283-84. Respondents did not appeal the district court's determination. Having not been a part of the appeal, the remand proceedings in the district court do not include the *Comito* issue.

Moreover, if the panel majority believed the *Comito* issue was swallowed up by the statute enacted by Proposition 9 and its remand order in Part II of the opinion, presumably it would have included it within the remand order rather than publish a separate, definitive decision on the issue.

IV. The Petition Does Not Present a Question of Differing Confrontation Rights than Litigated Below.

Contrary to unsupported statements in the opposition brief,[1] Petitioners have continually maintained that prohibiting them from using hearsay exceptions for the admission of evidence in parole revocation proceedings, while such exceptions would permit the admission of the same evidence in criminal prosecutions, affords greater due process rights to parolees than to criminal defendants, in violation of *Morrissey*. An obvious facet of Petitioners' argument is a discussion of and comparison to the hearsay exceptions deemed permissible by the Court for use in criminal prosecutions. Indeed, the panel majority began its discussion of due process rights of parolees by noting

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[1] Respondents are also wrong in saying that because distinctions between "testimonial" and "non-testimonial" hearsay do not arise in informal parole revocation hearings, both parties answered in the negative to a question during the session with the Special Master as to whether the distinction mattered. (Brief in Opp. at 11.) As borne out by the record, Petitioners' counsel did not answer the question in the negative for the reason Respondents suggest; rather, Petitioners' counsel indicated that there is nothing in *Comito* itself that says there should be a distinction between the two. *Valdivia* v. *Schwarzenegger*, 548 F. Supp. 2d 952, 992-93 (E.D. Cal. 2008). This statement is true because *Comito* never even discussed hearsay exceptions. So it stands to reason that it would not have discussed testimonial versus non-testimonial hearsay. Counsel's response does not amount to a negative response to the question or mean that the distinction was never encompassed within the issue raised and ultimately decided in the panel majority opinion.

that, "[t]he *Comito* test does not elevate the due process rights of parolees to those of criminal defendants." App. 12a. The panel majority then endeavored to justify its decision by discussing the nature of the due process afforded criminal defendants, and in particular, the testimonial and non-testimonial hearsay exceptions. App. 13a.

Respondents dismiss the panel majority's discussion as something only mentioned in response to the dissent. (Brief in Opp. at 12.) The immediately following paragraph of the panel majority decision, however, refutes Respondents' assertion. There, the panel majority responded to a different argument raised by the dissent; but, unlike their dialog on the testimonial and non-testimonial distinction, the majority explicitly remarked that the issue was one that "neither party raised in this appeal." App. 14a. If that same notion applied to the testimonial versus non-testimonial issue, the panel majority would have made that same remark before engaging in a discussion of it – but they did not.

Further, the comparison of criminal versus parole hearsay rights is prevalent in the dissenting opinion. Specifically, the dissent noted that the panel majority's decision "expands the confrontation rights of parolees beyond those held by criminal defendants." App. 28a (Noonan, J., dissenting). The dissent expressed the view that good cause must only be shown where the state relies on evidence that would violate the Confrontation Clause in criminal proceedings, "because the Fourteenth Amendment confers no

greater confrontation right than that afforded to criminal defendants." *Id.*, n.1.

Taking the cue, the en banc dissent devoted the most significant part of its opinion to a discussion of why the panel majority opinion recognized greater rights to parolees than to criminal defendants. App. 83a-89a. Discussed at length, of course, is the necessarily encompassed confrontational distinction between testimonial and non-testimonial hearsay exceptions for criminal defendants fashioned by this Court. *Id. Morrissey*'s requirement that the parolee must have an opportunity to confront witnesses unless the hearing officer finds good cause applies only if the parolee would otherwise be entitled to confront the witnesses. As the en banc dissent notes, any reading of *Morrissey* must now take into account this Court's redefinition of the "scope of the confrontation right in the constitutional context" in *Crawford* v. *Washington*, 541 U.S. 36 (2004). App. 83a, n.3.

Fundamentally, the discussion of this Court's treatment of testimonial and non-testimonial hearsay exceptions for use in criminal prosecutions is an inherently necessary component of Petitioners' recurring claim that *Morrissey* is flouted by first the district court, and then the Ninth Circuit, prohibiting Petitioners from using any hearsay exceptions in parole revocation hearings. There is no question that such a result gives parolees greater due process than is afforded to criminal defendants, and that this contravenes *Morrissey*.

V. The Petition Presents a Justiciable Controversy.

Respondents' lack-of-justiciability argument concerning the potential for extension of *Valdivia* v. *Schwarzenegger*, 599 F.3d 984 (9th Cir. 2010), to criminal defendants is misguided. The Petition does not ask this Court to adjudicate whether criminal defendants are entitled to confrontation rights under the Fourteenth Amendment as a result of the Ninth Circuit opinion. Rather, Petitioners request review on the Ninth Circuit's determination that under the Fourteenth Amendment, parolees in state administrative revocation hearings have a due process "confrontation right" to exclude hearsay, in the absence of a special showing of "good cause," when that hearsay would be admissible under the Confrontation Clause even against a defendant in a criminal prosecution. Because of the unsanctioned constitutional imbalance created by the panel majority's holding, as both the en banc dissent and the Petitioners rightly observe, there is a deleterious by-product of the opinion that would remain should this Court not grant review on the foundational question presented.

As the petition for a writ of certiorari explains, the Court's review is needed to resolve the conflict created by the Ninth Circuit's opinion, both with the Court's mandate in *Morrissey*, and with the Second Circuit's directly contrary holding. Respondents' arguments against granting review are unpersuasive. For the reasons addressed above and the reasons set

forth in the Petition, the Court should grant the writ of certiorari.

Dated: February 8, 2011

Respectfully submitted,

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